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Issue Date: 18 May 2007

Case No. 2007-CAA-1

In the Matter of
KIM SCHAFERMEYER,
Complainant

v.

BLUE GRASS ARMY DEPOT,
Respondent

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION &
CANCELLATION OF HEARING

This proceeding arises under the Resource Conservation and Recovery Act ("RCRA") located at 42 U.S.C. § 6971 and the Clean Air Act (CAA), 42 U.S.C. § 7622 and the regulations promulgated thereunder at 29 C.F.R. Part 24 which are employee protective provisions. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action related to the fulfillment of safety or other requirements established by the Clean Air Act.

Mr. Schafermeyer ("Complainant") requested a hearing based upon the Secretary's findings that he failed to timely file a complaint under the thirty day rule and that equitable tolling should not be applied. Furthermore, Complainant argues that he engaged in protected activity under the act and was terminated for engaging in protected activity.

On March 1, 2007, Respondent filed a "Motion for Summary Judgment" averring that there exists no genuine issue of material fact and facts of record warrant entry of judgment for Respondent.[1] Specifically, Respondent argued that Complainant filed his claim well outside of the 30 day requirement outlined in 29 CFR § 24, and it should therefore be barred. On April 9, 2007, Complainant responded asserting that the doctrine of equitable tolling should apply, and the claim should be allowed to proceed on the merits.[2]

[1] I note a motion for summary decision is akin to a motion for summary judgment under the Regulations.
[2] Complainant received an extension to file his response, which was initially due March 29, 2007.

Upon consideration of the matter, I have concluded for the reasons set forth below that there is no genuine issue as to any material fact and that the Respondent is entitled to summary decision.

FACTS

Affidavits

In support of the motion for summary decision, Respondent submitted numerous affidavits that were sealed by a notary public.[3] In response, Complainant submitted signed statements that were not administered before someone empowered to take or affirm oaths. According to one line of authority, the omission of a jurat is not fatal to the validity of an affidavit so long as it appears either from the instrument itself or from evidence aliunde that the affidavit was, in fact, duly sworn to before authorized officer. *Bigler v. State*, 602 N.E.2d 509 (Ind. Ct. App. 1st Dist. 1992). To attack an affidavit on improper execution grounds, there must be either evidence from the witness or notary or from the face of the affidavit showing that the execution was not made in the notary's physical presence. *Roberson v. Ocwen Federal Bank* FSB, 250 Ga. App. 350, 553 S.E.2d 162 (2001).

In some jurisdictions, however, in the absence of a valid jurat, a writing in the form of an affidavit has no force, no validity, and amounts to nothing, when standing alone or when construed in connection with other evidence. *Phoebe Putney Memorial Hosp. v. Skipper*, 226 Ga. App. 585, 487 S.E.2d 1 (1997). Another view is that an affidavit with an invalid jurat is admissible as an unsworn statement if there is no requirement that the statement be sworn for the purpose that it is offered. *Pappas v. State*, 179 Ind. App. 547, 386 N.E.2d 718 (2d Dist. 1979).

Similarly, in other jurisdictions, without the official certification by an officer authorized to administer oaths, a statement is not an "affidavit," and is not competent summary judgment proof. *Hall v. Rutherford*, 911 S.W.2d 422 (Tex. App. San Antonio 1995).

Here, I find that the signed statements from the Complainant are not a properly executed affidavit for the purposes of summary judgment. There is no evidence the signed statement was signed or sworn to in the presence of an individual authorized to administer oaths under law. Therefore, I find these statements do not hold the weight of sworn testimony – but take them for what they are: unsworn statements.[4]

[3] I note that Respondents Exhibit 9 does not have a notary seal – only the signature of the person making the statement. Therefore for reasons discussed *infra*, it shall be given the weight of unsworn testimony.

[4] However, I note that even had I given the proffered signed statements the weight of an affidavit for purposes of summary decision – I still would have come to the same conclusion: that summary decision is appropriate in this instance. The statements offer no proof as to why, ultimately, equitable tolling should be applied.

Facts Relevant for Summary Decision Consideration

Mr. Schafermeyer was hired as a physical scientist by the U.S. Army Chemical Materials Agency ("CMA") on or about August 22, 2005. (CX 1.5; RX 1).[5] This appointment was subject to a one year probationary period. *Id.*

Complainant received notice of his termination via letter on July 12, 2006, which was to take effect on July 18, 2006. (CX 1.5; EX 2).[6] Until that time, he was placed on administrative leave. His termination letter asserted he was being removed from his position for: failure to complete testing assignments in a timely manner; failure in performance objectives; inappropriate and disrespectful remarks to supervisors, staff, and Commander. It claimed Mr. Schafermeyer stated the "Commander isn't fit to teach a gym class let alone try to tell me about math;" he called Ms. McCoy – his immediate supervisor, "an incompetent chemist;" and he blamed other co-workers for his own calculation mistakes. It noted he received verbal warning that such comments were inappropriate on or about 25 May 2006. It was also asserted Complainant falsely reported to the Chemical Surety Officer, Ms. Sydor, that Mr. Bilyeu (a supervisor) was being investigated by the FBI and would imminently be indicted for fraud. The letter cited 5 C.F.R. § 315.804 as the authority for his removal. (CX 1.5; EX 2). It also noted that should he wish to contest his termination, he should file an appeal within 30 calendar days after the effective date to the Merit Systems Protection Board ("MSPB").

Mr. Schafermeyer filed an appeal with the MSPB on August 17, 2006 at 4:52pm. (CX 1.7; RX 2). On MSPB Form 185-2, Complainant asserted he should not have been fired because the agency failed to "provide adequate resources allowing the required, successful performance of professional duties in a rigidly controlled, secure area, or any area," and failed "to provide a safe work environment as mandated by Federal and State law." *Id.* He also stated that "Mr. Thomas Bilyeu, and his agents, [have] taken this action against me in retaliation for my refusal to compromise my scientific integrity." Mr. Shafermeyer articulated his concern that he was denied the resources required to complete his job. These resources included "(1) viable Standard Operational Procedures as required by the Department of the Army and the State of Kentucky, and (2) a safe work environment as mandated by the Environmental Protection Agency and Occupational Health and Safety Administration, the Department of the Army, and the State of Kentucky." He concludes by stating the action taken against him was "procedurally improper" because he was not allowed the "reasonable time available to other probationary employees" to file a written answer to the notice of his termination.[7]

(CX 1.7; RX 2).

[5] For purposes of this decision, CX refers to Complainant's exhibits, CX 1.# refers to Complainant's exhibits attached to exhibit one (Declaration of Mr. Schafermeyer), and RX refers to Respondent's exhibits.

[6] The interrogatories indicate Respondent mailed the termination letter on July 7, 2006. However, Complainant asserts that he did not receive the termination letter until July 12, 2006. (CX 1). He cites the USPS number with a signed receipt date of July 12, 2006. (CX 1). Even though his testimony is not sworn, I take Mr. Schafermeyer at his word that he did not receive notice of his termination until July 12, 2006.

[7] In his statement, Mr. Schafermeyer relayed the fact that he suffered a medical incapacitation on July 10, 2006 and informed his office of such. His termination letter was mailed on July 11, 2006 and received the next day. (CX 1).

In a subsequent letter dated September 2, 2006 to the MSPB, Mr. Schafermeyer attempts to clarify his position. (RX 3). He notes that his termination should be reversed because "Blue Grass Army Depot, [et. al.] has a history of an inappropriate, politically polarized work atmosphere maintained by Mr. Bilyeu and his Chemist Supervisor, Ms. Bonnie McCoy." He goes on to state "[t]his inappropriate federal work environment existed prior to my employment at BGCA and was not made known to me prior to my tenure at BGCA." To provide proof of the hostile work environment, he points out the situation of a fellow co-worker. Specifically, he states that

> [I]n 2005, Mr. Donald Van Winkle encountered these phenomena when he reported safety concerns and was inappropriately reprimanded and segregated from his work station about August of 2005. Among his legal recourse actions were the US Labor Department complaint #2006ERA24, 14 July 2006; and Equal Employment Opportunity Case # ARBLUEG06MAR0091. Mr. Van Winkle is represented by Mr. Richard Condit, P.E.E.R. Attorney … and he may be contacted for further details.[8]

(EX 3).

Attached to this letter are copies of four letters from present and former employees articulating the "pre-existing, partisan political situation" created from Mr. Bilyeu's and Ms. McCoy's "miscarriage of public trust." (EX 3).

In or around September 12, 2006, the MSPB sent Complainant a letter requesting clarification on his position. In a response dated September 22, 2006, Mr. Schafermeyer defended his assertion that he was wrongfully terminated by pointing out

> [t]he existence of an abusive management team in a self-contained, isolated military depot, has produced a self-sustained community in the later development stages of an ideologue cult similar to a political party. It is this self-containment that defines the non-traditional polarized political parties at Blue Grass Chemical Activity, Richmond, Kentucky. In that the choice is involuntary is a matter of illegality.

(RX 4). Later in the same letter however, Mr. Schafermeyer stated that Respondent provided misleading statements to the Kentucky Department of Environmental Protection ("KDEP") concerning use of live CASARM chemical weapons agent to standardize analytical instruments. In short, Mr. Schafermeyer articulated that "weaponized agents in the range of 100% and 200% of the minimum level of human toxicity" were released into the air. (RX 4). There were no statements to the effect of stating Complainant believed he was retaliated against for reporting this violation or raising concerns.

In his unsworn statement, Mr. Schafermeyer stated that he received a phone call at home from administrative law judge Scott D. Cooper at 12:00pm on October 23, 2006. (CX 1).[9] Judge Cooper supposedly advised him that his MSPB appeal would be dismissed. Complainant

[8] Mr. Schafermeyer provides Mr. Condit's phone number in this statement.
[9] It appears Judge Cooper presided over Complainant's MSPB appeal.

asserted the administrative law judge advised him that his complaint belonged in the OSHA Whistleblower protection program. Two days later on October 25, 2006, Complainant voluntarily withdrew his MSPB Complaint. (CX 1, 1.8; RX 5). In his withdraw letter submitted to the MSPB, Mr. Schafermeyer noted he

> [r]emain[ed] convinced that the closed, secured workplace of BGCA is a unique sociological cohort that expresses its political uniquely. The remedies as a Whistleblower under Resource, Conversation, and Recovery Act, 42 U.S.C. § 6971, and the Clean Air Act, 42 U.S.C. … §7622 are sufficient to effect change in the safety of Worker Populations affected by the malfeasance of the BGCA management team. The global problem of the Army and Instrument Ventilations is a larger matter. My responsibility as a scientist remains consistent.

(RX 5; CX 1.8).

On the same day, Mr. Schafermeyer filed his first complaint under the Whistleblower Protection Statutes via a fax dated October 25, 2006. He stated it was his belief that his termination was the result of retaliation for "disclosures of safety problems and violations of law at" Blue Grass Army Depot. ("BGAD"). (RX 6).[10]

Also contained within the complaint are his reasons why the statute of limitations should be waived and equitable tolling applied. First, he claims that he was without the benefit of legal counsel. Second, he asserts he made diligent efforts to have this same complaint redressed through other avenues, not knowing at the time that a Department of Labor whistleblower complaint was the correct avenue. He lists these efforts as including the filing of a timely Merit Systems Protection Board (MSPB) complaint, and attempts to address his concerns through the employee union and through the Kentucky Department of Environmental Protection. (CX 1; RX 6).

DISCUSSION AND APPLICABLE LAW

Summary judgment (summary decision as applied to administrative law) is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317,322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has produced evidence to show that it is entitled to summary judgment, the party seeking to avoid such judgment must affirmatively demonstrate that a genuine issue of material fact remains for trial. *LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 920 (7th Cir.1997).

In deciding a motion for summary judgment, a court must "review the record in the light most favorable to the nonmoving party and ... draw all reasonable inferences in that party's

[10] Complainant also lists other reasons he believes he was retaliated against in this filling – mainly he points out examples of mistreatment which took place while he was employed at BGAD. Complainant also asserts that the release of live, dilute VX, Sarin, and Mustard agents were a danger to civilians in the surrounding area as well as employees.

favor." *Vanasco v. National-Louis Univ*., 137 F.3d 962, 964 (7th Cir.1998). *See also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Nevertheless, the nonmovant may not rest upon mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See also LINC Fin. Corp*, 129 F.3d at 920. A genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, 106 S.Ct. 2505, 91 L.Ed.2d 202, or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252. Therefore, if the court concludes that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,' " and summary judgment must be granted. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 289 (1968)).

The standard for granting summary decision in whistleblower cases is analogous to the rules governing summary judgment under the Federal Rules of Civil Procedure. *See Bushway v. Yellow Freight, Inc*., ARB No. 01-018, ALJ No. 2000-STA-52, slip. op. at 1 (ARB Dec. 13, 2002); Fed.R.Civ.P. 56(e). Summary decision is appropriate for either party where the record shows that "there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *Celotex Corp.*, 477 U.S. at 322. A material fact is one that might affect the outcome of the suit, and a genuine dispute is one where a reasonable jury could find for the nonmovant based on the evidence. *Anderson*, 477 U.S. at 247. The opposing party may not rest upon the mere allegations or denials of such pleading but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c). All evidence and factual inferences are viewed in a light most favorable to the nonmovant. *Matsushita Elec*., 475 U.S. at 587; *see also Williams v. Lockheed Martin Corp*., ARB NOS. 99-54 & 99-064, OALJ Nos. 1998-ERA-40, 42 (Sept. 29, 2000).

Under the environmental whistleblower statutes, a complainant must file a complaint within thirty days of the alleged violation. *See* 33 U.S.C. § 1367(b); 42 U.S.C. § 300j-9(i)(2)(a)(1); 42 U.S.C. § 6871(b); 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 9610(b); 42. U.S.C. § 7622(b)(1). The Administrative Review Board has clarified that the thirty-day limitations period begins to run on the date that a complainant receives final, definitive, and unequivocal notice of a discrete adverse employment action. *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 6 (ARB Apr. 30, 2004). The Board has also applied the discovery rule and has held that statutes of limitations in whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Kaufman v. United States Envtl. Prot. Agency*, ALJ No. 02-CAA-22 (Sep. 30, 2002) (citing *Whitaker v. CTI-Alaska, Inc*., ARB No. 98-036, ALJ No. 97-CAA-15 (ARB May 28, 1999)). The date an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *Id.* The Administrative Review Board explained that discrete acts of discrimination are easy to identify. Examples are failure to promote, denial of transfer, termination and refusal to hire. *Id*. (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).

The undisputed facts establish that Complainant's claim was filed outside the statutory thirty-day time period. Under the CAA, the time period begins to run on the day Complainant received notice of his termination. On July 12, 2006, Complainant received notice that he was to be terminated effective July 18, 2006.[11] Specifically, the letter stated he was being removed from his position of Physical Scientist during his probationary period for three reasons. First, he failed to complete testing assignments in a timely manner – which resulted in extra work for his colleagues. Second, he failed in one performance objective of maintaining the chemical hygiene plan. Third, the letter stated he made numerous inappropriate and disrespectful comments over the last few months to his supervisors, other staff, and the Commander.[12] This letter is clearly within the definition of a final, definitive, and unequivocal notice of an adverse employment decision under the whistleblower statutes. *See Swenk v. Exelon Generation Co*., ARB No. 4-028, ALJ No. 03-ERA-30 (ARB Apr. 28, 2005). Thus, Complainant received notice of an adverse employment action on July 12, 2006. Accordingly, Complainant had thirty days from receipt of this letter to bring his complaint (August 11, 2006).

It is undisputed that Mr. Schafermeyer did not originally file a whistleblower complaint until October 25, 2006. *See* Complaint. This is clearly not within the thirty day limitation period prescribed in 29 CFR § 24. Thus, Complainant's claim is time barred by the statute of limitations unless he can show good cause for equitable tolling. He cannot for the reasons discussed *infra*.

Equitable Tolling

The primary case detailing equitable tolling under the whistleblower provisions located at 29 C.F.R. 24 is *School Dist. Of City of Allentown v. Marshall*, 657 F.2d16 (3rd Cir. 1981). There, the court stated that the restrictions on equitable tolling must be scrupulously observed. *Id*. at 19. When Congress sets a limitations period, even if it is for only a few days, Congress does not leave courts the decision as to which delays might or might not be "slight." *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 at 240 (1976). In adopting the standard set forth by the Second Circuit, the Third Circuit stated equitable tolling may be appropriate only when

> 1. the defendant has actively misled the plaintiff respecting the cause of action,
> 2. the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> 3. the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Allentown, 657 F.2d. at 19-20. The court noted that these categories were not exclusive, but instructive. Furthermore, the court added from their reading of *Burnett v. New York Central*

[11] The termination letter is dated July 6, 2006 – but a USPS receipt shows it was not received by Complainant until July 12, 2006.

[12] The letter gives specific examples of remarking the Commander "isn't fit to teach a gym class let alone try to tell me about math," calling another supervisor an incompetent chemist, blaming other coworkers for his own calculation mistakes. The letter also states he was given verbal warnings about the appropriateness of these comments on or about May 25, 2006.

Railroad, 380 U.S. 424 (1965), "that the filing of a claim in the wrong forum must also be timely before it will toll the appropriate limitations period." *Id.* at 20. *See also Burnett*, 380 U.S. at 426-27.

In a hearing a Title VII case, the Sixth Circuit, the jurisdiction under whose this case arises, noted that the "most common situation calling for equitable tolling involves some affirmative representation or action by the employer that causes an employee to miss a filing deadline." *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988). In articulating factors which should be considered when deciding if equitable tolling should be applied, the court stated a judge should consider: "(1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." *Id*.

I. Diligence in Pursuing His Rights

a. Filing in the Wrong Forum

Mr. Schafermeyer asserts equitable tolling should be applied because he filed his claim in the wrong forum (i.e., the MSPB). There are many problems with this assertion. First, he filed this claim on August 17, 2006 – which is 36 days after he received notice of his adverse employment action on July 12, 2006.[13] Thus, Complainant did not file anywhere within the limitations period.

Second, the claim filed with the MSPB makes no mention of environmental concerns. It only asserts he was denied proper procedure in defending his termination under his probationary status. Thus, had he filed the exact claim under the above whistleblower laws, it would have been dismissed for lack of subject matter jurisdiction.

As noted above, Mr. Schafermeyer's initial complaint to the MSPB makes no mention of protected activity. While interpreting the protected activity provisions in the whistleblower statutes, the Secretary of Labor has broadly defined the term as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be grounded in conditions constituting reasonably perceived violations of environmental laws. *Johnson v. Old Dominion Security*, 86-CAA-3, 4 & 5 (Sec.y May 29, 1991); *Minard v. Nerco Delamar Co*., 92-SWD-2 (Sec.y Jan. 25, 1995). In other words, the complainant's concern must at least touch on the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec.y Sept. 22, 1994). Furthermore, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. *Kesterton v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

Following this line of precedent, the Board has stated that to determine whether the complainant has engaged in protected activity, the court must look at whether the complainant's

[13] *See Kaufman, supra* (noting the thirty day limitations period begins running the day Complainant receives notice of the adverse employment action – not the day the action goes into effect).

alleged activities furthered the purpose of the environmental acts or related to their administration and enforcement. *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 00-CAA-20, 01-CAA-09, 01-CAA-11 (ARB June 30, 2004). The purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare. 42 U.S.C. § 7622; *see also Crosby v Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug 17, 2003).

His initial complaint with the MSPB only speaks to the fact he was fired because of "partisian politics," his "scientific integrity," and his appeal should be heard because he was denied "proper procedure." The only portion of his complaint which touches the environment is the lack of "a safe work environment." However, the Secretary has stated that complaints which only relate to workplace safety do not touch upon general public safety and health.[14] *See Sawyers v. Baldwin Union Free School District*, 85-TSC-1 (Sec'y Oct. 24, 1994); *Aurich v. Consolidated Edison Co. of New York, Inc*., 86-CAA-2 (Sec'y April 23, 1097). Furthermore, allegations of official misconduct or alleged wrongful interference by management have no basis for CAA relief. *Tyndall v. United States Envtl. Prot. Agency*, 93-CAA-6 (ALJ Oct. 12, 1994).

The second letter to the MSPB dated September 2, 2006 also does not touch upon a concern for the environment, but speaks again only of politics, a hostile work environment, and a denial of proper procedure. Mr. Schafermeyer specifically cites that his termination should be reversed in accordance with 5 C.F.R. §§ 315.804-806. (RX 3). There is no mention of any statute covering whistleblower activity.

Not until his letter dated September 22, 2006, almost two and a half months after he received notice of his termination, does Mr. Schafermeyer make any official mention of any environmental violations which he reported.[15] Hence, this is his first affirmable mention of potential protected activity under the Act – nearly two and a half months after he received notice of his termination.

b. Contacting the Union

Complainant also asserts through unsworn testimony that he attempted to make a whistleblower complaint to the Union. First, the union is not the proper forum to raise a whistleblower complaint. Furthermore, through a sworn affidavit, the Union Steward states that Complainant never mentioned any environmental concerns in their meeting – just the incompetence of management and his dissatisfaction with his work situation. (RX 8).

[14] I also note that in his withdrawal letter to the MSPB, Complainant only mentions that a whistleblower claim will be "sufficient to effect change in the safety of worker populations" and to address the misconduct of management. (CX 1.8; RX 5).

[15] I note he does not assert in this letter he was fired for this reason.

c. Contacting Kentucky Department of Environmental Protection

Complainant also asserts through his unsworn testimony that he met with KDEP on September 7, 2006 to raise his environmental concerns.[16] He states this meeting was set up after initial phone conversations and emails that were exchanged beginning around July 21 to August 1, 2006.[17] Even if this were affirmed through sworn testimony for the purposes of summary decision, it is still well outside the limitations period.

Considering all the above evidence, it is clear that Complainant was not diligent in pursuing a claim that he was retaliated against for raising environmental concerns. Furthermore, even if the concerns he raised were in fact of the nature the Act is designed to protect, they were raised well past the statute of limitations deadline.

II. Lack of Notice/Knowledge

Complainant also asserts that equitable tolling should be applied because he was without the benefit of legal counsel and because he was unaware of the "proper remedy." I note "[i]gnorance of the law is not enough to invoke equitable tolling." *Allentown*, 657 F.2d at 21. *See also Quina v. Owens-Corning Fiberglas Corp*., 575 F.2d 1115, 1118 (5th Cir. 1978). First, Complainant lists counsel as Mr. Bernard Lovely, Esq. on his MSPB complaint. However, a signed statement (not notarized) by his attorney Mr. Lovely states he did not represent Mr. Schafermeyer in this matter. (CX 5). He states when Mr. Schafermeyer contacted him in July or August of 2006, he advised him he had no experience in this matter and that he should seek counsel elsewhere or proceed *pro se*. The fact that Mr. Schafermeyer chose to proceed of his own violation was his choice – and the consequences are his as well.[18] The fact that he did not know the "proper remedy" is no excuse when so many outlets were available to him to discover what to do.

[16] I note this alleged meeting took place nearly two months after he received notice of his termination. Thus, if this were sworn testimony for the purposes of summary judgment, it would still not show he raised a complaint within 30 days of receiving notice of an adverse employment action. In his own testimony, Complainant does not assert that he tells these individuals he was fired because he raised environmental concerns. (CX 1.)

[17] Complainant has stated he requested copies of these emails back in November. (CX 1.6). However, he has provided no copies of these emails himself, which were sent *after* Complainant was terminated. Thus, they would not be stored on his work computer, but his home computer. He has also failed to obtain an affidavit (sworn or not) from any employee at KDEP to verify this assertion. Furthermore, Complainant stated he initially talked to Mr. Buchanan (agent of KDEP) about two weeks after his termination. He asserts he informed Mr. Buchanan he was (1) wrongfully terminated; and (2) he offered his expertise in the area of air monitoring protocols for Chemicals Weapons Agent and safety issues at BGCA. His unsworn statement does not directly indicate he was wrongfully terminated *for reporting* environmental concerns at BGCA. However, while the two *could* be linked, he does not provide an affidavit (or even unsworn testimony) of Mr. Buchanan, or anyone else, to support this self-serving claim.

[18] Furthermore, he noted Mr. Van Winkle was represented by P.E.E.R., the group which now represents Complainant. He goes as far as to name Mr. Van Winkle's attorney by name and *provides his phone number* for the MSPB should they wish to contact him. There is nothing indicating anyone prevented Mr. Schafermeyer from contacting this group (or attorney) to seek the same advice given to Mr. Van Winkle regarding whistleblower activity. Current counsel for Complainant intimates that he believed PEER was only available to members of the union. This belief is the fault of no one but himself.

Second, there is ample evidence that Complainant in fact had notice of the proper remedy, if he truly believed he was fired for protected activity. In his second letter to the MSPB dated September 2, 2006, Mr. Schafermeyer articulates that Mr. Van Winke was punished for reporting safety concerns and *goes as far as to cite the specific case number of Mr. Van Winkle's whistleblower complaint*. He also notes it was filed with the United States Department of Labor. Furthermore, Ms. Bonnie McCoy has provided unsworn testimony that she saw a file on Mr. Schafermeyer's desk pertaining to Mr. Van Winkle's case.[19] The fact he cited Mr. Van Winke's case shows that Mr. Schafermeyer was in fact aware of whistleblower protections. Thus, I do not believe Complainant's assertion that he was not aware, or should not have been aware, of the "proper remedy."

I would also like to note that Mr. Schafermeyer is a highly educated individual. He indicates that he holds a Bachelor of Science Degree in Chemistry, that he is a certified expert in chemical weapons agent, an agent custodian, a chemical hygiene officer, a senior physical scientist, a senior analytical chemist, and a registered professional industrial hygienist. As demonstrated in his numerous communications with the MSPB (and his declaration located at CX 1), he is also an effective communicator through the written word. His research of statutes, as demonstrated through citation is impressive.[20] This shows an aptitude to conduct research on his own behalf. This demonstrates that had he truly believed he was retaliated against for reporting environmental concerns – despite the fact he knew, or should have known, of ample resources available to assist him – he possessed the capacity to discover these outlets for himself.

III. Absence of Prejudice to Respondent

The Supreme Court stated that "[a]lthough absence of prejudice [to the respondent] is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify tolling is identified, it is not an independent basis for invoking the doctrine." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). First, I note no factor which would justify tolling has been established. Respondent also argues that it would be significantly prejudiced if equitable tolling were to be granted under these circumstances. It asserts a message would be sent that invites complainants to come forward with "very old or non-existent facts." While this may be an exaggeration of the present situation, the point is well taken. Here, Complainant has presented no evidence he gave notice of a whistleblower action to the Respondent until late September 2006, over two and a half months after receiving notice of his termination. Thus, some level of prejudice would result to the Respondent by allowing equitable tolling to apply.

Conclusion

Here, Complainant admits he filed his whistleblower complaint well after the statute of limitations passed. No evidence has been presented that would justify the use of the doctrine of equitable tolling. Complainant did not raise any whistleblower claims (concern for the environment or people other than employees) until September 22, 2006 – nearly two and a half

[19] I do not give this statement much weight – given the lack of a jurat.

[20] I note that in his letters to the MSPB, he even uses correct Blue Book citation formats – a format used by attorneys.

months after he received notice of termination – and thus well after the thirty day period for filing.[21] His claim filed in the MSPB was not of the same nature as the claim filed here. It simply asserted that he was denied proper procedure in responding to his termination. Even if it were of the same nature, it was *still* filed outside the thirty day requirement. As such, even in constructing the facts in a light most favorable to the Complainant, I find there is no genuine issue of material fact, and summary decision is appropriate. [22]

Recommended Decision and Order

Therefore, IT IS RECOMMENDED that Respondent's Motion for Summary Decision should be GRANTED.

Furthermore, IT IS ALSO ORDERED that the hearing in this matter scheduled for July 10, 2007 is hereby canceled.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).

[21] There is a possibility through unsworn testimony that he may have raised such issues on September 7, 2006 – but this is still well outside the limitations period.
[22] This conclusion would be reached regardless of the validity of Complainant's declaration as an affidavit.